

In The Matter Of:
United States vs.
PFC Bradley E. Manning

Vol. 14
July 2, 2013
UNOFFICIAL DRAFT - 7/2/13 Morning Session

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VOLUME XIV

IN THE UNITED STATES ARMY

UNITED STATES

VS.

MANNING, Bradley E., PFC COURT-MARTIAL

U.S. Army, xxx-xx-9504

Headquarters and Headquarters Company,

U.S. Army Garrison,

Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

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The Hearing in the above-titled matter was

continued on Tuesday, July 2, 2013, at 11:00 a.m., at

Fort Meade, Maryland, before the Honorable Colonel

Denise Lind, Judge.

DISCLAIMER

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1 APPEARANCES :

2
3 ON BEHALF OF THE GOVERNMENT :

4 MAJOR ASHDEN FEIN

5 CAPTAIN JOSEPH MORROW

6 CAPTAIN ALEXANDER von ELTEN

7
8 ON BEHALF OF THE ACCUSED :

9 DAVID COOMBS

10 MAJOR THOMAS HURLEY

11 CAPTAIN JOSHUA TOOMAN

1 PROCEEDINGS,

2 THE COURT: Court is called to order. Major
3 Fein, please account for the parties.

4 MR. FEIN: Yes, ma'am. All parties present
5 in the court at the last recess are present. This is an
6 open unclassified session and the court security officer
7 has finished his post trial checklist and it will be
8 filed in the allied papers.

9 THE COURT: Major Fein, would you like to set
10 forth for the record any exhibits that have been admitted
11 since the last open session?

12 MR. FEIN: Yes, ma'am. There have been two
13 appellate exhibits that have been marked. The first is
14 appellate exhibit 589 titled the EEI list, Bates number
15 00527925 through 00527929, and appellate exhibit 590
16 which is titled value list, Bates number on 00527930
17 through 00527932.

18 Additionally, Your Honor, as of the start of
19 this session, this current unclassified open session,
20 there's 13 members of the media at the media operations
21 center, one stenographer, no media in the courtroom, and

1 approximately eight spectators in the courtroom. The
2 trailer is available but not being utilized.

3 THE COURT: Thank you.

4 The court yesterday held a closed session
5 where we had the witness, Mr. Lewis. The government was
6 laying a foundation for their request to have Mr. Lewis
7 recognized as an expert. We ended the day following that
8 closed session. The court is prepared today to rule on
9 two issues. One is the government motion to qualify Mr.
10 Lewis as an expert, and the other is relevance and
11 non-hearsay for prosecution motion for judicial notice.

12 Before I announce the rulings on the record,
13 is there anything else we need to address at this point?

14 MR. COOMBS: No, Your Honor.

15 MR. FEIN: No, ma'am.

16 THE COURT: All right. I'll begin with the
17 judicial notice ruling.

18 Ruling. Relevance and non-hearsay for
19 prosecution motion for judicial notice.

20 On 6 January 2013 the court deferred ruling
21 on the government motion for the court to take judicial

1 notice of certain adjudicative facts until the government
2 offered the evidence at trial to allow the court to be
3 fully informed when making relevance and hearsay
4 determinations. Appellate exhibit 472. The court ruled
5 it would grant the government's motion for judicial
6 notice if the government could establish relevance and
7 the non-hearsay or hearsay exception usage.

8 On 28 June 2013 the government renewed its
9 request it to the court to take judicial notice of the
10 following three adjudicative facts:

11 One. Julian Assange was located in Iceland
12 in February of 2010 and was working on the Icelandic
13 modern media initiative.

14 Two. Lieutenant Colonel Packnett was quoted
15 in the New York Times article dated 18 March 2010.

16 And, three. A New Yorker profile of Julian
17 Assange titled, quote, no secrets, colon, Julian
18 Assange's mission for total transparency, unquote, exists
19 and was dated on 7 June 2010.

20 The government also provided a proffer of
21 relevance and non-hearsay or hearsay exception use,

1 appellate exhibit 587, and pinpoint cites to the admitted
2 exhibits in support of its proffer, AE 587 Alpha.
3 Defense opposes and maintains its relevance objection to
4 one and hearsay objections to two and three, and
5 relevance as well.

6 The court adopts the law as stated in its 16
7 January 2013 rule regarding judicial notice motions,
8 appellate exhibit 472.

9 Conclusions of law. The court has reviewed
10 the proffer by government and each of the pinpoint cites
11 in support of prosecution exhibits 81, 123 and 30, and
12 the testimony of Special Agent Shaver and Mr. Lamo.

13 The court also notes the defense conceded
14 during the testimony of Mr. Chad Madaras that any
15 searches on Intelink for Iceland and WikiLeaks in the
16 open source center on the computer shared by Mr. Madaras
17 and PFC Manning was not conducted by Mr. Madaras.

18 Two. Each of the three judicially noticeable
19 adjudicative facts are relevant and offered for
20 non-hearsay purposes.

21 Ruling. The government motion for judicial

1 notice of the adjudicative facts in one through three
2 above is granted. So ordered the 2nd day of July, 2013.

3 We'll have that marked as the next appellate
4 exhibit in line.

5 All right. Proceeding on.

6 Ruling. Government motion to qualify Mr.
7 Daniel Lewis as an expert. Before I read this
8 unclassified ruling, I do want to advise that there has
9 been a classified supplement to this ruling that will not
10 be read in open court.

11 On 1 July 2013 the government moved the court
12 to recognize Mr. Daniel Lewis as an expert witness in
13 counterintelligence, CI, and value of U.S. government
14 information to foreign intelligence sources. The
15 government established its foundation in both open and
16 closed sessions.

17 The defense does not oppose Mr. Lewis as an
18 expert in CI generally, but does challenge his
19 qualifications in offensive CI and valuation of
20 information to foreign intelligence sources. The parties
21 presented oral arguments and submitted written briefs.

1 Having received the briefs and having heard the oral
2 arguments, the court finds and rules at follows:

3 Findings of fact. Mr. Lewis has 29 years of
4 experience in CI, including CI operations,
5 investigations, collections, analysis and functional
6 services. Included in this experience is a tour as chief
7 of training for the Department of Defense, DOD, Joint
8 Counterintelligence Training Academy, JCITA, for the
9 military and defense DIA. Mr. Lewis's experience
10 includes working as a senior investigator at the foreign
11 senior activity, FCA, which operates sensitive and
12 significant defense investigations.

13 Two. From 2006 to 2013 Mr. Lewis was the
14 chief of the counterespionage division at DIA. This was
15 the DIA's most senior CI position. Mr. Lewis was the
16 senior level subject matter expert for CI operations and
17 investigations, supervising 50 to 55 CI professionals at
18 any given time. He is the most experienced CI
19 investigator in DIA.

20 The counterespionage division retained
21 oversight of all CI investigations and operations with

1 DOD and the National Security Agency, NSA, to include
2 espionage investigations and offensive CI operations.
3 Mr. Lewis personally briefed the Secretary and deputy
4 secretary for defense for intelligence and Congress.

5 Three. Mr. Lewis was a lead investigator in
6 multiple CI investigations including Colonel George
7 Trofimoff, an Army colonel, and David Boone, both
8 provided documents to Russia. Mr. Lewis was awarded the
9 investigator of the year for both cases in 1996 and 1999
10 respectively.

11 Four. CI investigations or espionage
12 investigations for DOD has an equity, CI investigations
13 on individuals known to be involved in adversary
14 intelligence or terrorist organizations. Mr. Lewis has
15 experience as a case officer in espionage investigations,
16 but has never been a case agent or a case agent manager
17 for offensive CI operations.

18 In his position as chief of the
19 counterespionage division at DIA he has oversight for all
20 DOD offensive CI operations.

21 Five. Mr. Lewis has testified as a fact

1 witness in court, but has never been qualified as an
2 expert witness.

3 The law. A witness who is qualified as an
4 expert by knowledge, skill, experience, training or
5 education may testify in the form of an opinion or
6 otherwise, if: A, the expert scientific, technical or
7 other specialized knowledge will help the trier of fact
8 to understand the evidence or to determine a fact in
9 issue; B, the testimony is based on sufficient facts or
10 data; C, the testimony is the product of reliable
11 principals and methods; and, D, the expert has reliably
12 applied the principals and methods to the facts of the
13 case.

14 Two. An expert may base opinion on facts or
15 data in the case that the expert has been made aware of
16 or has personally observed. The expert in the particular
17 field -- if experts in the particular field would rely on
18 those kind of facts or data in forming an opinion on the
19 subject, they need not be admissible for the opinion to
20 be admitted. MRE 703 in relevant part.

21 Three. The court is the, quote-unquote,

1 gatekeeper for all expert testimony, whatever the basis.
2 To allow expert testimony the court must find relevance
3 and reliability. Among the factors the court may
4 consider to determine whether expert testimony is
5 admissible under MRE 701 is -- excuse me -- 702, is
6 whether a theory or technique has been tested; two,
7 whether it has been subject to peer review and
8 publication; three, the known or potential rates of error
9 in using the particular scientific techniques and
10 standards controlling the techniques, operations; and,
11 four, whether the theory and technique is generally
12 accepted in the particular scientific field.

13 These factors are not a, quote-unquote, test
14 for reliability, rather reliability is a flexible inquiry
15 focused on the goal of insuring that the expert, quote,
16 whether basing testimony on professional studies or
17 personal experience employs in the courtroom the same
18 level of intellectual rigor that characterizes the
19 practice of experts in the relevant field, unquote.
20 United States versus Sanchez 965 MJ 145, Court of Appeals
21 for the Armed Forces, 2007, citing Kumho Tire Company LTD

1 versus Carmichael.

2 Four. Relevant evidence may be excluded if
3 its probative value is substantially outweighed by the
4 danger of unfair prejudice or other conditions.

5 Conclusions of law.

6 One. Mr. Lewis' expertise comes from 29
7 years of his experience in and oversight of various CI
8 functions. He is an expert in all facets of CI. His
9 testimony will be based on information gathered through
10 offensive CI operations and systematically entered into
11 systems employed by the counterespionage division of DIA.

12 These systems are routinely used by DIA to
13 collect data from offensive CI investigations -- excuse
14 me -- operations, and such data is used to prepare
15 briefings and other memoranda for the secretary, for the
16 secretary and deputy secretary of defense for
17 intelligence and for Congress, and has been generally
18 accepted by these entities as accurate. The data
19 collected by these systems is reliable.

20 Two. The court has issued an oral supplement
21 to this ruling. The court accepts Mr. Lewis as an expert in

1 CI. The court does not accept Mr. Lewis as an expert in
2 the value of information to foreign intelligence
3 services. This expertise is too overbroad.

4 Mr. Lewis may testify and offer an opinion
5 with regard to the value of certain charged documents
6 upon laying a proper foundation within the parameters of
7 the oral classified supplement to this ruling.

8 Three. The court has done an analysis under
9 MRE 403 and finds that Mr. Lewis's testimony is highly
10 probative. The probative value of the evidence is not
11 substantially outweighed by the danger of unfair
12 prejudice or other 403 factors. The court will consider
13 this evidence for its proper purpose within the purpose
14 of its ruling.

15 Ruling. The government motion to qualify Mr.
16 Lewis as an expert is granted in part. So ordered, the
17 2nd day of July of 2013.

18 This ruling will be added as the next
19 appellate exhibit in line.

20 Now, the court has met briefly with the
21 parties prior to coming on open session today. Yesterday

1 when we held the closed session the testimony was
2 basically with respect to laying the foundation for the
3 court to rule on whether or not Mr. Lewis would be
4 accepted as an expert and under what conditions and what
5 would be the scope of his testimony and opinions, should
6 the court accept him as an expert.

7 As my ruling just indicated, I have granted
8 the government's motion in part, so this will necessitate
9 another closed session because Mr. Lewis when he's
10 actually testifying about his testimony and the scope of
11 his opinion within the parameters of the court's ruling,
12 he hasn't done that yet. So the parties and I discussed
13 how we would proceed today and we set up the following
14 rough schedule. The parties are going to have an
15 extended lunch to go over some issues that they need to
16 do. We'll come back on the record I guess at this point
17 1330 still good for the parties?

18 MR. FEIN: Yes, ma'am.

19 MR. COOMBS: Yes, Your Honor.

20 THE COURT: We'll come back on the record on
21 closed session at 1330 for Mr. Lewis's testimony. We

1 will have another open session in this court, again, we
2 have to gauge the time for that because some of this goes
3 by how long a witness testifies, but we are, the parties
4 have approximated, we should be ready to go at 1530, is
5 that correct?

6 MR. FEIN: Yes, ma'am.

7 MR. COOMBS: Yes, Your Honor.

8 THE COURT: One additional issue that was
9 discussed during the RCM 802 conference is I have two
10 roles here, my role as a military judge is to rule on
11 interlocutory questions like I just did, and my role as a
12 fact finder is to consider evidence that's presented
13 before me on the merits. Now, in yesterday's closed
14 session a general foundation was laid for the purposes of
15 the expert opinion, and rather than have that same
16 testimony being laid out all over again before the finder
17 of fact, the government has proposed and I believe the
18 defense has concurred that the court may consider in its
19 finder of fact role the testimony that was set forth in
20 yesterday's closed session; is that correct?

21 MR. FEIN: Yes, Your Honor. And also in the

1 open session as well because the government broke the
2 foundation into opening and close.

3 THE COURT: And the defendant did as well.
4 So it's lays basically all of Mr. Lewis's testimony.

5 MR. COOMBS: Yes, Your Honor.

6 MR. FEIN: Yes, ma'am.

7 THE COURT: Is there anything else at this
8 point we need to address prior to recessing the court
9 till we reconvene for the closed session at 1300 and we
10 have our public session at 1530?

11 MR. FEIN: No, ma'am.

12 MR. COOMBS: No, ma'am. Just for the public,
13 1530 would be 3:30.

14 THE COURT: Thank you. All right. Court is
15 in recess until 1530 or 3:30.

16 (LUNCH RECESS.)

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